

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF NEW YORK

In re

DENISE DWYER

Case No. 03-15739

Debtor(s)

APPEARANCES:

RONALD J. KIM, ESQ.
Attorney for Debtor
P.O. Box 318
Saratoga Springs, NY 12866

EHRlich, HANFT, BAIRD & ARCODIA
Attorneys for Trustee
64 Second St.
Troy, NY 12180

Marc S. Ehrlich, Esq.
Trustee

Hon. Robert E. Littlefield, Jr., U.S. Bankruptcy Judge

MEMORANDUM-DECISION

Currently before the court is the motion of Denise Dwyer (“Debtor”) to convert her chapter 7 case to chapter 13. Opposition has been filed by Marc S. Ehrlich, the Chapter 7 Trustee (“Trustee”). The court has jurisdiction pursuant to 28 U.S.C. §§ 157(a), 157(b)(1), 157(b)(2)(A) and 1334(b).

FACTS

Based upon the pleadings submitted, the court finds the following:

- 1) The Debtor filed a chapter 7 petition on August 23, 2003.
- 2) The Debtor is a registered nurse. According to her schedules, the Debtor’s total monthly income is \$2,631.95 and her monthly expenses are \$2,609.
- 3) On Schedule A, the Debtor lists a one family residence located at 110 Goldfinch Lane,

Ballston Spa, New York (the “Residence”), valued at \$108,000.

4) On Schedule D, the Debtor lists Pioneer Savings Bank as the holder of a first mortgage against the Residence in the amount of \$78,777.45, and Conseco Finance as the holder of a second mortgage against the Residence in the amount of \$36,003.88.

5) The Debtor resides at the Residence with her elderly father. The Debtor is her father’s primary care giver.

6) The Debtor has not yet received her discharge.

7) The deadline for filing a complaint objecting to the Debtor’s discharge was December 2, 2003, and no objections to discharge have been filed.

8) The Trustee has possession of approximately \$5,000 representing the non-exempt portions of the Debtor’s bank account and vehicle for administration in the chapter 7 estate.

9) The Trustee received an offer from the USR Group, Inc. (“USR”) to purchase the estate’s interest in the Residence.

10) On April 8, 2004, the Trustee filed a motion to sell the estate’s interest in the Residence based upon USR’s offer.

11) On April 12, 2004, in response to the Trustee’s motion, the Debtor filed the within motion to convert her case to chapter 13. The Trustee filed opposition to the Debtor’s motion on April 19, 2004.

ARGUMENTS

Citing *In re Marcakis*, 254 B.R. 77 (Bankr. E.D.N.Y. 2000), the Trustee argues that, despite the express language of 11 U.S.C. § 706(a), the Debtor does not have an absolute right to convert, and the court may exercise discretion in deciding a debtor’s request to convert. Additionally, the Trustee asserts that the Debtor’s request to convert should be denied because she will not be able to satisfy the confirmation standards of § 1325(a)(4) and (a)(6)¹ in that she is

¹ Section 1325 states in relevant part:

(a) [T]he court shall confirm a plan if -

....

(4) the value, as of the effective date of the plan, of property to be distributed under the plan on

not in a position to pay into a plan the liquidation value of the chapter 7 estate.

In support of her motion, the Debtor sets forth that her father resides with her, and she is the primary care giver. For these reasons, she wishes to convert her case in order to retain the Residence. She further states that because of the high demand for nurses, there is little risk of her defaulting under a chapter 13 plan.

ISSUE

Whether the Debtor has an absolute right to convert her case to chapter 13 pursuant to § 706(a).

DISCUSSION

The court recently addressed the issue raised in this case in *In re Carrow*, Case No. 02-17838 (September 8, 2004).² This court held that a debtor has the right to convert from chapter 7 to chapter 13 as long as (1) the debtor's case was not previously converted, and (2) the debtor is eligible for chapter 13. *Id.*; See 11 U.S.C. § 706(a), (d). As such, the court respectfully declined to follow *Marcakis*.

No argument is put forth by the objectant that either (1) the Debtor's case was previously converted, or (2) the Debtor is not eligible for chapter 13 pursuant to § 109. Thus, the court finds no impediments to conversion of the Debtor's case to chapter 13. As discussed more fully in *Carrow*, any confirmation issues regarding plan feasibility or the liquidation test pursuant to §

account of each allowed unsecured claim is not less than the amount that would be paid on such claim if the estate of the debtor were liquidated under chapter 7 of this title on such date;

....

(6) the debtor will be able to make all payments under the plan to comply with the plan.

² The court assumes familiarity with the *Carrow* decision.

1325(a)(4) and (a)(6) are preserved and may be addressed at the appropriate time.

CONCLUSION

Based upon the foregoing, the Debtor's case is converted to chapter 13, and a chapter 13 Trustee shall be appointed. The Debtor's counsel shall submit an order in conformance with *Carrow*, and this decision.

Dated: September 9, 2004

Hon. Robert E. Littlefield, Jr.
U.S. Bankruptcy Judge